Supreme Court, U.S.
FILED
06-458 AUG 18 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

COOPERATIVA DE SEGUROS DE VIDA,
DE PUERTO RICO (COSVI)
Petitioner,

v.

F.A.C., INC., d/b/a FINANCIAL ADVISORS
AND CONSULTANTS, INC. (FAC), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN I. HOROWITZ
Counsel of Record
MILLER & CHEVALIER
CHARTERED
655 15th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for Petitioner

QUESTION PRESENTED

Whether Fed. R. Civ. P. 60 enables a federal district court to manufacture jurisdiction to enforce a settlement by entering a new judgment months after it dismissed a lawsuit without retaining jurisdiction to enforce the settlement.

PARTIES TO THE PROCEEDING

In addition to petitioner, Gabriel Dolagaray, María Cristina Ortiz, José A. Brull, Andrés Rodríguez, Arcilio Rivas, Daniel Santiago, José Ramón González, Antonio Marrero, William Soria, and Insurance Company X were named as Defendants or Third Party Defendants in the trial court and are respondents here.

STATEMENT PURSUANT TO RULE 29.6

Petitioner is a cooperative, not a corporation. No publicly held company has a 10 percent or more ownership interest in petitioner.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 9

A. The Court of Appeals' Decision Misapplies Fed. R. Civ. P. 60 and Severely Undermines This Court's Decision in *Kokkonen* 10

B. The Court of Appeals' Decision Conflicts with Decisions of Other Courts of Appeals That Reject Attempts to Use Rule 60 to Evade the Established Limitations on Federal Court Jurisdiction to Enforce Settlements 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

4:20 Communications, Inc. v. The Paradigm Co.,
336 F.3d 775 (8th Cir. 2003) 17, 18

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 15

Boston Car Co. v. Acura Automobile Division, American Honda Motor Co.,
971 F.2d 811 (1st Cir. 1992) 13

Cobell v. Kempthorne,
No. 05-5269, 2006 U.S. App. LEXIS 17248
(D.C. Cir. July 11, 2006) 19

Dura-Wood Treating Co. v. Century Forest Indus., Inc., 694 F.2d 112 (5th Cir. 1982) 12

In re Frigitemp Corp.,
781 F.2d 324 (2d Cir. 1986) 12

Gonzalez v. Crosby,
125 S. Ct. 2641 (2005) 11

Harcon Barge Co. v. D&G Boat Rentals, Inc.,
784 F.2d 665 (5th Cir. 1986) 11

Hinsdale v. Farmers Nat'l Bank & Trust Co.
823 F.2d 993 (6th Cir. 1987) 16

Kalt v. Hunter (In re Hunter),
66 F.3d 1002 (9th Cir. 1995) 11

Kokkonen v. Guardian Life Insurance Co.,
511 U.S. 375 (1994) ..... *passim*

McAlpin v. Lexington 76 Auto Truck Stop, Inc.,
229 F.3d 491 (6th Cir. 2000) 11, 15, 16, 18

Neuberg v. Michael Reese Hospital Foundation,
123 F.3d 951 (7th Cir. 1997) 16, 17, 19

Pfizer Inc. v. Uprichard,
422 F.3d 124 (3d Cir. 2005) 12

United States v. Kellogg (In re West Texas Mktg. Co.), 12 F.3d 497 (5th Cir. 1994) 12

FEDERAL RULES

Fed. R. Civ. P. 41(a)(2) 3

Fed. R. Civ. P. 60 ..... *passim*

MISCELLANEOUS

12 James W. Moore et al., *Moore's Federal Practice*
§ 60.62 (3d ed. 2006) 11, 12

Cooperativa de Seguros de Vida de Puerto Rico (COSVI) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 449 F.3d 185. The various opinions and orders of the district court (Pet. App. 21a-29a) are not reported. (The August 2005 opinion of the district court (Pet. App. 26a-29a) was filed under seal and is included in the appendix to the petition filed under seal but not in the public version of the petition.)

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on May 1, 2006. A timely petition for rehearing was denied on May 22, 2006. Pet. App. 19a-20a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 60 of the Federal Rules of Civil Procedure provides:

Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and

thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT

1. This case grows out of a mid-trial settlement reached in 2002 between petitioner Cooperativa de Seguros de Vida de Puerto Rico (COSVI) and respondent F.A.C., Inc. (FAC). COSVI is a fiscal intermediary that acts for the federal government in evaluating claims submitted under the Medicare program. FAC is a consulting firm that was hired by the Puerto Rico Department of Health to review past reimbursement claims submitted by the Department. Under the agreement, FAC was to submit to COSVI for reconsideration any claims that it identified as under-reimbursed, with FAC receiving as its fee a percentage of the proceeds owed to the Department. In 1995, FAC submitted a set of claims for additional reimbursement, but COSVI rejected those claims. Pet. App. 2a.

In 1998, FAC brought suit against COSVI in federal district court alleging RICO violations in connection with the handling of the reimbursement requests. That suit went to trial before a jury in April 2002. On the third day of trial, the parties reached a settlement. The terms of the settlement were not put in writing. The parties notified the district court of the settlement, and, at the parties' request, the court dismissed the case with prejudice pursuant to Fed. R. Civ. P. 41(a)(2). Pet. App. 2a-3a. The court's dismissal order was a simple one-paragraph judgment order reciting that the "parties have come to a settlement agreement" and adding that "[p]ursuant to that agreement and Federal Rule of Civil Procedure 41(a)(2)," the court was dismissing the case with prejudice. Pet. App. 21a. The order gave no indication of the specific terms of the settlement.

2. One month later, on May 24, 2002, COSVI sent a letter to the Centers for Medicare and Medicaid (CMS), the federal agency that had the power to approve reopening of certain of the past reimbursement claims identified by FAC. The letter

asked CMS to authorize reopening of the claims "based on facts learned by COSVI as a result of its litigation with FAC, Inc. and pursuant to 42 CFR Section 405.1885(d)," a regulation that permits stale claims to be reopened if the determination "was procured by fraud." Pet. App. 4a. The letter also requested that, if reopening is granted, the claims should be audited by a different fiscal intermediary. COSVI C.A. App. 1.

CMS declined the request in June 2002, explaining that the standard three-year period for reopening claims had expired and that the exceptions to that period "do not fit the facts of this case." Pet. App. 4a. Accordingly, the letter concluded, "COSVI would not be empowered to reopen the reports." COSVI C.A. App. 2. COSVI thereupon filed a second request with CMS in July 2002, stating that it "strongly recommends" that CMS reconsider its decision not to authorize reopening. The letter proceeded to emphasize "the need for careful § 405.1885(d) analysis prior to deciding whether or not to authorize reopening these claims." *Id.* at 3. In particular, the letter urged CMS to review certain "documentary evidence under seal" in the district court that COSVI offered to seek to have unsealed. *Id.* COSVI later did succeed in having this evidence, an FBI report, unsealed, but CMS took no action on the request for reconsideration. Pet. App. 4a; D. Ct. Dkt. 278, 279.

3. In the meantime, beginning in May 2002, FAC filed multiple motions asking the district court to enforce the settlement by ordering COSVI to undertake certain actions. Pet. App. 3a. COSVI responded by opposing FAC's requests and also urged the court to require FAC to dismiss a related action in the local Puerto Rico trial court, as COSVI thought had been agreed. *Id.* at 4a.

In August 2002, the court resolved the dispute by issuing an "amended final judgment" to replace the judgment en-

tered in April 2002 at the close of trial. Pet. App. 22a-24a. The court stated that it had participated in the settlement discussions at trial and, accordingly, there was no need for an evidentiary hearing to resolve the questions before it. The amended judgment then recited five points that reflected the court's understanding of the settlement (*id.* at 5a, 22a-23a):

> a. The payment to Plaintiff's officials by Defendant COSVI of an amount that the parties agreed not to disclose publicly.
>
> b. The payment is to be in consideration of Plaintiff's claims under 31 P.R. Laws Ann. §§ 1802 and 1803, as all allegations under RICO have been dismissed.
>
> c. The sending of a letter by COSVI to [CMS], on behalf of FAC, Inc., requesting the reopening of the Medicare Part A reimbursement claims.
>
> d. That any payments made as a result of the audit of the Medicare claims would be deposited in this Court for distribution purposes.
>
> e. The dismissal with prejudice of the instant case and of [the case pending in the local Puerto Rico trial court].

The court then proceeded to explain why it believed that the original settlement clearly embodied an agreement by FAC to dismiss the pending local case, and it provided that FAC could move to receive the monies deposited with the court only after certifying to the dismissal of the local court action. *Id.* at 23a-24a. Subsequently, FAC dismissed that action and received the monies deposited in the court. *Id.* at 5a.

4. More than a year later, in late 2003, FAC filed a new motion with the district court asking it to order COSVI to comply with various obligations that FAC claimed were part

of the settlement – including reopening the claims on its own authority without authorization from CMS. Pet. App. 6a. In September 2004, the district court denied the motion, stating that the case had been settled, with judgment having been entered accordingly in August 2002. *Id.* at 25a. That judgment, the court stated, disposed of all pending claims and was "res judicata, final, and unappealable." *Id.*

A month later, in October 2004, the district court reopened the matter pursuant to FAC's reconsideration motion. In August 2005, three years after entry of the amended final judgment in the case, the court entered a new order directing COSVI to make a new request to CMS for authorization to reopen the claims. *Id.* at 26a-29a. After reciting the text of COSVI's first letter, the court stated that it "FINDS that a letter that is silent on the reasons for the request for reopening the reimbursement claims would clearly fail to satisfy the terms of the settlement." *Id.* at 29a. (The court did not discuss COSVI's second letter, which had also been sent prior to the entry of the court's final August 2002 judgment.) The court then ordered COSVI to send a new request for reopening to CMS containing the following sentence: "It has come to our attention that fraudulent activities took place within our organization with regards to the claims at issue, and, pursuant to 42 CFR Section 405.1885(a) and (d), we request that you reopen and reassess the claims in question due to a finding of fraud or similar fault." *Id.*

5. COSVI objected to this order, contending that the sentence in question would be a false statement because COSVI did not believe that any fraudulent activities had taken place within COSVI in connection with the claims at issue. COSVI obtained a stay of the district court's order and appealed, contending that the district court lacked jurisdiction to enter the order regarding the settlement and, alternatively, that the order misstated the terms of the settlement.

The court of appeals affirmed. Pet. App. 1a-16a. The court first addressed the question of the district court's jurisdiction to enter the order in question. The court observed that, under *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), a federal court retains jurisdiction to enforce a settlement after dismissing a case only when the terms of the settlement are made part of the order of dismissal. Pet. App. 7a. Because the settlement terms were not incorporated into the original April 2002 judgment, the court of appeals concluded that that judgment did not confer jurisdiction upon the district court to enforce the settlement. *Id.* at 7a-8a.

The court, however, proceeded to hold that the amended judgment entered in August 2002 "does go far enough to satisfy *Kokkonen*" and provided the court with jurisdiction to enter its August 2005 order. *Id.* at 8a. The court observed that the amended judgment was entered "without any objection from the parties as to its authority to do so" and that "[n]either party appealed from this new judgment." *Id.* Because the amended judgment adjudicated a dispute about the terms of the settlement, the court concluded that it expressed "an intention to retain jurisdiction to resolve disputes about the settlement." *Id.*

The court rejected COSVI's objection that, under *Kokkonen*, the district court had no authority to enter its amended judgment. *Id.* at 9a-10a. The court agreed that *Kokkonen* prevented the district court from directly enforcing the settlement, but noted that this did not affect the court's authority to amend its judgment under Fed. R. Civ. P. 60. *Id.* at 9a. Notwithstanding that FAC had not invoked Rule 60 in its filings in either the district court or the court of appeals, and that the district court had never suggested that it was acting under the authority of Rule 60 when it amended its judgment, the court of appeals held that the amended judgment could stand under the authority of Rule 60. The court did acknowledge that "[q]uite possibly it was a mistake to

amend the judgment in August 2002" because Rule 60 generally is narrowly construed. Pet. App. 9a. It concluded, however, that there existed a "colorable" "inference" that the district court originally intended to reserve the authority to enforce the settlement and hence that the amended judgment was correcting an omission in the original judgment. *Id.* at 9a-10a. Because the district court had jurisdiction to determine whether Rule 60 applied, the court ruled, "it was up to the party objecting to amendment to file a timely appeal from the amended judgment." *Id.* at 10a. Since neither party took such an appeal, the court of appeals regarded the amended judgment as validly creating jurisdiction for the district court to enforce the settlement in the future.

On the merits, the court concluded that it owed deference to the district court's ruling because it was based on "personal knowledge by the judge based on his judicial participation in negotiations," rather than an evidentiary hearing. *Id.* at 12a. The court acknowledged that COSVI might have bargained for a letter like the one it actually sent in May 2002, but concluded that it "seemed unlikely" that FAC would settle for such a letter. *Id.* at 13a. The court also noted COSVI's counsel's remark in his opening statement at trial that a certain COSVI officer "may have been involved in bribes," but the court failed to take into account that this remark was accompanied by both the explanation that this officer had no involvement in considering the FAC claims and the assertion that "[t]he evidence will show you that COSVI defendants did everything right." *Id.*; *see* April 16, 2002 Trial Tr. 46-47, 50, 52.

The court acknowledged that "FAC's case for its reading is hardly air tight," noting that the "term sheet" that it circulated during settlement negotiations did not mention any letter. Pet. App. 14a. Furthermore, the court recognized that FAC's position was difficult to square with FAC's failure to immediately protest as inadequate the letter that COSVI sent

in May 2002. *Id.* The court also noted that the district court's August 2002 amended judgment indicated only that COSVI should send a letter to CMS requesting reopening, but did not contain any requirement that COSVI admit to fraud in that letter. *Id.* at 14a-15a. Nonetheless, the court concluded that the district court's "subsequent interpretation of the agreement" was "not inconsistent with this earlier summary" because "the focus of the August 2002 decision was not on the letter." *Id.* at 15a. The court concluded that "the district judge's assessment of COSVI's obligation is reasonable and more likely right than wrong," and hence it affirmed the district court's decision. *Id.*

REASONS FOR GRANTING THE PETITION

The federal courts are courts of limited jurisdiction. As this Court unanimously held in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), a federal court generally does not have jurisdiction to enforce a settlement just because it had jurisdiction over a lawsuit that was dismissed pursuant to the settlement. Here, the exception to that general rule concededly was not met because the settlement was not made part of the judgment of dismissal. The court of appeals, however, has allowed an end run around the rule set forth in *Kokkonen* by invoking Fed. R. Civ. P. 60 to approve a two-step procedure in which the district court created its own continuing jurisdiction where none existed before. This decision conflicts with decisions of other courts of appeals that have strictly applied *Kokkonen* and have rejected similar attempts to use Rule 60 to authorize enforcement of settlements. Review by this Court is necessary to preserve the vitality of *Kokkonen* and to prevent disarray in the courts of appeals over the jurisdictional limitations on federal courts' authority to enforce settlements.

A. The Court of Appeals' Decision Misapplies Fed. R. Civ. P. 60 and Severely Undermines This Court's Decision in *Kokkonen*

In *Kokkonen*, this Court made clear that a federal district court does not have inherent jurisdiction to enforce a settlement that results in the dismissal of a lawsuit in that court. "Enforcement of the settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." 511 U.S. at 378. The district court can retain jurisdiction over the settlement at the time it dismisses the suit by making the parties' obligation to comply with the terms of the settlement "part of the order of dismissal—either by separate provision . . . or by incorporating the terms of the settlement agreement in the order." *Id.* at 381. But where the court fails to make the parties' obligation to comply with the settlement part of the dismissal order, its jurisdiction over the dispute evaporates with the dismissal, and it has no jurisdiction to enforce the settlement.

Here, as in *Kokkonen*, when the district court terminated the lawsuit in April 2002, "the only order . . . was that the suit be dismissed." *Id.* at 380. Therefore, that order was "in no way flouted or imperiled by the alleged breach of the settlement agreement." *Id.* at 380-81. Thus, when FAC filed its motion to enforce the settlement in May 2002, the district court plainly had no jurisdiction to entertain and rule upon that motion.

The court of appeals recognized that the district court lacked jurisdiction to enforce the settlement after it dismissed the case in April 2002 without making the settlement a part of the dismissal order. The court, however, concluded that Fed. R. Civ. P. 60 allowed the district court to create that jurisdiction several months later by entering an amended judgment. That conclusion is untenable.

At the outset, we note that Rule 60 by its terms did not authorize the amended judgment. The rule states that parties to litigation may obtain "relief from judgment" under certain specified conditions. The court of appeals indicated that the district court's action might be justified under either Rule 60(a), which permits correction of "clerical mistakes," or Rule 60(b), which provides for relief from judgment in the case of "mistake" (Rule 60(b)(1)) or for "any other reason justifying relief from the operation of judgment" (Rule 60(b)(6)). Pet. App. 9a-10a. Plainly, Rule 60(b) is not applicable because by its terms relief under that section is available only "[o]n motion" by a party, and a court is not empowered to award Rule 60(b) relief unless a party asks for it. *See, e.g.*, 12 James W. Moore, et al., *Moore's Federal Practice* § 60.62 (3d ed. 2006); *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 504 (6th Cir. 2000); *Kalt v. Hunter (In re Hunter)*, 66 F.3d 1002, 1006 (9th Cir. 1995); *see also Gonzalez v. Crosby*, 125 S. Ct. 2641, 2650 (2005) ("relief under Rule 60(b)(6) . . . requires a showing of 'extraordinary circumstances'"). There was no such motion here, as FAC never invoked Rule 60(b), but rather moved only to enforce the settlement.

Nor was there any basis for amending the judgment under Rule 60(a) on the theory that the original judgment was infected by a "clerical mistake." As the court of appeals acknowledged, the grounds for relief in Rule 60 are generally construed "stringently because they compromise the finality of judgments." Pet. App. 9a: *see also Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986) (en banc) ("[t]he scope of Rule 60(a) is . . . very limited"). Plainly, there was no "clerical mistake" here in the ordinary sense of that term; there is no reason to believe that the court's April 2002 judgment misstated the court's intentions in any way. In certain limited circumstances, the courts have allowed relief under Rule 60(a) on the theory that the

section covers an "omission" in the original judgment that misrepresents the court's intentions. But this principle applies only to omissions that fall into the category of "mindless and mechanistic mistakes." *Pfizer Inc. v. Uprichard*, 422 F.3d 124, 130 (3d Cir. 2005); *United States v. Kellogg (In re West Texas Mktg. Co.)*, 12 F.3d 497, 505 (5th Cir. 1994). It does not authorize changes that alter the substantive rights of the parties by correcting a legal error in the original judgment. *See generally* 12 *Moore's Federal Practice* § 60.11.

Moreover, the conclusion that that an omission in the judgment contradicts the original intention of the court must have some objective support in the record. *See Pfizer*, 422 F.3d at 129-30 (Rule 60(a) "encompasses only errors 'mechanical in nature [and] apparent on the record'") (internal citation omitted); *In re Frigitemp Corp.*, 781 F.2d 324, 328 (2d Cir. 1986) ("no clear indication in the record" that district court originally intended the relief sought under Rule 60(a)); *Dura-Wood Treating Co. v. Century Forest Indus., Inc.*, 694 F.2d 112, 114 (5th Cir. 1982) ("Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another."). Otherwise, Rule 60(a) would be an unrestricted and unreviewable grant of authority to district courts to change final judgments.

Here, there is nothing in the contemporaneous record to suggest that there was an inadvertent omission in the original judgment or that the trial court originally intended to incorporate the settlement into the order of dismissal. Indeed, there is not even an after-the-fact assertion by the district court of such an original intent, since the district court did not purport to issue its amended judgment under the authority of Rule 60(a). Rather, the only justification advanced here for the court of appeals' conclusion concerning the district court's original intent was what the court of appeals

acknowledged was a "not especially strong" inference from later conduct – namely, the parties' failure to challenge jurisdiction in the enforcement proceedings commenced by FAC in May 2002. *See* Pet. App. 10a.

The facts here thus contrast sharply with those in *Boston Car Co. v. Acura Automobile Division, American Honda Motor Co.*, 971 F.2d 811 (1st Cir. 1992), the case relied upon by the court of appeals as the exemplar of the legitimate invocation of Rule 60(a). *See* Pet. App. 9a-10a. In *Boston Car*, the trial court had granted a motion seeking summary judgment on all issues in the case. Therefore, resolution of a pending counterclaim "was necessarily resolved by [the court's original] order," and it was appropriate to modify the judgment under Rule 60(b) to grant judgment on the counterclaim. *See id.* at 814. By contrast, the court of appeals' weak inference here drawn from the parties' later inaction is patently inadequate to satisfy the requirements for altering a judgment under Rule 60(a).

More generally, the district court's action was not geared to affording "relief from judgment," as contemplated by Rule 60. The original judgment was that the suit be dismissed. FAC's motion did not seek relief from that judgment by having the suit reinstated, nor did the court's amended judgment have any effect on the relief that had been ordered. Thus, this case does not fall within the situations where some courts have ruled that claiming a breach of a settlement can justify a Rule 60 motion for relief from a dismissal; FAC sought only "enforcement of the settlement agreement, and not . . . reopening of the dismissed suit by reason of breach of the agreement that was the basis for dismissal." *See Kokkonen*, 511 U.S. at 378.

The court of appeals further erred in ruling that the August 2002 amended judgment could be validated, and used to create jurisdiction to enforce the settlement indefinitely into

the future, because neither party appealed from the amended judgment. *See* Pet. App. 10a. Contrary to the court's assertion, COSVI could not have appealed that judgment because it was the prevailing party and had no objection to raise on appeal. The only relief ordered in August 2002 (apart from repeating the four-month-old dismissal) ran against FAC, not COSVI – namely, a direction to dismiss the pending local suit. *Id.* at 23a. Nor were the statements in the amended judgment about the letter to CMS adverse to COSVI; the judgment merely recited that the settlement required COSVI to send a letter to CMS requesting reopening of the claims, which COSVI had already done. Thus, there was no reason for COSVI to appeal. Yet the court of appeals concluded that COSVI's failure to appeal this favorable decision had the effect of creating new, continuing jurisdiction for the district court and exposing COSVI to the risk that the court would modify the stated terms of the settlement years later.[1]

That conclusion cannot be sustained. The failure of the parties to appeal, of course, made the district court's amended judgment res judicata even if the court lacked jurisdiction to enter the judgment, and therefore it bound the parties to the specific relief ordered. But it could not serve as the springboard for jurisdiction for the court to evade *Kokkonen* and enforce the settlement in the future. The

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[1] We note that, although the court of appeals found that the district court's jurisdiction to enter the August 2005 enforcement order rested upon the August 2002 amended judgment, the August 2002 judgment played no role in the merits of the district court's 2005 decision. The district court did not purport to construe that judgment, and FAC's motion did not rely upon it. *See* D. Ct. Dkt. 305. Rather, FAC's motion and the court's August 2005 ruling were based entirely on their respective reconstructions of what occurred in the April 2002 settlement negotiations – completely uninformed by the August 2002 amended judgment.

jurisdiction of a federal court must rest upon grounds set forth in the Constitution or a federal jurisdictional statute. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Jurisdiction over the original RICO suit rested on 28 U.S.C. § 1331, but that ground for jurisdiction terminated after the court dismissed that suit in April 2002 without making the terms of the settlement part of the dismissal order. No other statutory basis for jurisdiction arose thereafter, and therefore the court lacked jurisdiction to enter its August 2005 order that purported to enforce the settlement.

B. The Court of Appeals' Decision Conflicts with Decisions of Other Courts of Appeals That Reject Attempts to Use Rule 60 to Evade the Established Limitations on Federal Court Jurisdiction to Enforce Settlements

The court of appeals' decision conflicts with the strict approach that other courts of appeals have taken to enforcing the principles of *Kokkonen*, even in the face of efforts to invoke Fed. R. Civ. P. 60. In *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000), as here, the district court dismissed a lawsuit with prejudice because the parties had reached a settlement, but did not make the terms of the settlement part of the dismissal order. *See id.* at 497. Subsequently, the defendants moved the district court to hold the plaintiff in contempt for violating the terms of the settlement. The district court ruled that it had jurisdiction to grant the requested relief notwithstanding *Kokkonen* because Fed. R. 60(b)(6) authorized it to "re-open the above styled action for the limited purpose of enforcing the Court's Orders and the terms of the settlement agreement." *Id.* at 499.

The Sixth Circuit reversed, holding that the district court lacked jurisdiction to enforce the settlement. The court stated that the district court had "erred in construing Rule 60(b) as a broad exception to" *Kokkonen*. *Id.* at 501. The

court explained that Rule 60 could operate only to reinstate the lawsuit, which would be relief from the judgment of dismissal, but not to create jurisdiction to enforce the settlement. The court emphasized:

> The district court's contempt order was clearly 'more than just a continuation or renewal of the dismissed suit,' and affirming the district court's reliance on Rule 60(b)(6) *would create an exception to the holding in* Kokkonen *that would swallow the rule*, giving the district court the type of broad enforcement jurisdiction that the *Kokkonen* Court reserved to courts that either specifically retain jurisdiction to enforce a settlement agreement or that expressly incorporate the terms of the agreement in a valid and enforceable order.

Id. at 503 (quoting *Kokkonen*, 511 U.S. at 378) (emphasis added). Rather, the court stated, "the 'unconditional dismissal with prejudice terminates the district court's jurisdiction except for the *limited purpose* of reopening and setting aside the judgment of dismissal within the scope allowed by Rule 60(b).'" *Id.* (quoting *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, 823 F.2d 993, 995-96 (6th Cir. 1987) (emphasis by the *McAlpin* court).

Other courts of appeals have reached the same conclusion as the Sixth Circuit on analogous facts. In *Neuberg v. Michael Reese Hospital Foundation*, 123 F.3d 951 (7th Cir. 1997), the district court dismissed a lawsuit with prejudice after making certain that the parties had agreed that the settlement completely resolved the case. The court did not retain jurisdiction over the case or incorporate the terms of the settlement into the dismissal order. *See id.* at 953. Subsequently, the plaintiffs contended that the defendants were not complying with the settlement, and the plaintiffs filed a Rule 60(b) motion seeking "to [v]acate [the] dismissal or-

der . . . and for [e]ntry of [j]udgment in [a]ccordance with [the] [t]erms of [the] [s]ettlement [a]greement." *Id.* at 954. That is, the plaintiffs sought exactly the same relief that the district court afforded in this case – vacating a dismissal order that did not incorporate settlement terms and substituting a new or amended judgment that did recite settlement terms so that the court would have jurisdiction to enforce the settlement.

The Seventh Circuit held that this relief was not available under Rule 60. The court explained that "the plaintiffs were not really trying to reopen the dismissed suit, which would be the effect of a Rule 60(b)(6) order setting aside the final judgment." *Id.* at 955. Instead, the plaintiffs wanted the court "to interpret the agreement," which would conflict with the principle of *Kokkonen* "that a dispute over the interpretation of the settlement agreement is a legal matter distinct from the underlying litigation." *Id.* Instead of seeking Rule 60 relief from the district court, the court of appeals concluded, the appropriate course of action for the plaintiffs was to bring suit in *state court* to enforce the settlement agreement. *Id.* at 956.

Similarly, in *4:20 Communications, Inc. v. The Paradigm Co.*, 336 F.3d 775 (8th Cir. 2003), the district court dismissed a lawsuit after a settlement was reached; the court did not make the settlement part of the dismissal order but it expressly retained jurisdiction for 90 days to afford the parties the opportunity to seek enforcement of the settlement. *Id.* at 777. More than 90 days later, the defendant moved to enforce the settlement. In response, the district court issued an order that recited settlement terms that the court stated "accurately reflects the agreement of the parties" and that would be "considered fully enforceable" in the future. *Id.* The district court explained that it could disregard the 90-day limitation because the defendant had not sued for breach of

contract, but rather had merely "asked the court to define the terms of the settlement." *Id.* at 778.

The court of appeals reversed, holding that the distinction drawn by the district court was "a distinction without a difference" and that the court's amended order violated *Kokkonen*. *Id.* Although, as in this case, neither the parties nor the court had invoked Rule 60, the court of appeals took pains to state that a remand would be futile because Rule 60 would not authorize the district court's action. Even if Rule 60 might be available if the parties sought relief from judgment on the ground that there was no settlement, neither party "denie[d] that the case was settled. Rather, each urged the district court to interpret the predismissal settlement in its favor." *Id.* at 779. The court ruled that "[t]hat dispute does not warrant Rule 60(b) relief from a final judgment *that did not incorporate the terms of the settlement*." *Id.* (emphasis in original).

The court of appeals' decision here flies in the face of these decisions from other courts of appeals. If the court's decision is allowed to stand, it would impose upon litigants and courts in the First Circuit "an exception to the holding in *Kokkonen* that would swallow the rule." *McAlpin*, 229 F.3d at 503. That outcome would subject litigants in the First Circuit to the risk of having final dismissal orders altered under Rule 60 in circumstances where finality would be honored for litigants in other circuits.

* * * * *

After struggling with the sparse record before it on the merits of COSVI's appeal, and recognizing the district court's "own familiarity with the background events" (Pet. App. 16a), the court of appeals here decided that the district court was "more likely right than wrong." *Id.* at 15a. Despite the barriers to fully informed review by the court of appeals, the court observed that the "district judge is to be

admired for grasping the nettle." *Id.* That observation is completely misguided. Federal courts do not have the option of choosing to "grasp the nettle" whenever they believe they can contribute to the resolution of a controversy. They are courts of limited jurisdiction. Unless they have some statutory basis for exercising jurisdiction over a controversy, the federal courts must step aside.

In the situation presented here, the state courts are fully capable of resolving whether a party has breached a settlement contract. *See Kokkonen*, 511 U.S. at 382; *Neuberg v. Michael Reese Hospital Foundation*, 123 F.3d at 956. A state court, of course, would have no familiarity with the settlement discussions and likely would have to conduct an evidentiary hearing to resolve the parties' dispute. But such a hearing can only contribute to a fair resolution of the dispute. Indeed, in this case, where the district court imposed a draconian requirement upon COSVI – namely, stating to a government agency that it committed fraud when COSVI believes that statement to be false – it is regrettable that the court relied upon its own recollections and inferences from three-year-old discussions rather than upon an evidentiary hearing. *Cf. Cobell v. Kempthorne*, No. 05-5269, 2006 U.S. App. LEXIS 17248 at *20 (D.C. Cir. July 11, 2006) (criticizing the court for "requir[ing] [the defendant] to attest to facts it disputed").

Thus, strict adherence to *Kokkonen* not only vindicates the limitations on federal court jurisdiction, it also contributes to the proper resolution of disputes over litigation settlements. This Court should grant certiorari here in order to forestall disarray in the courts of appeals and to ensure uniform application of *Kokkonen*'s principles regarding federal court jurisdiction to enforce settlements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN I. HOROWITZ
Counsel of Record
MILLER & CHEVALIER
CHARTERED
655 15th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for Petitioner

AUGUST 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2332

F.A.C., INC.,
d/b/a FINANCIAL ADVISORS AND CONSULTANTS, INC. (FAC),

Plaintiff, Appellee,

v.

COOPERATIVA DE SEGUROS DE VIDA DE PUERTO RICO, (COSVI),

Defendant-Third-Party Plaintiff, Appellant,

GABRIEL DOLAGARY, MARÍA CRISTINA ORTIZ, JOSÉ A. BRULL, ANDRÉS RODRÍGUEZ, ARCILIO RIVAS, and DANIEL SANTIAGO,

Defendants-Third-Party-Plaintiffs,

INSURANCE COMPANY X,

Defendant,

v.

JOSÉ RAMÓN GONZÁLEZ, ANTONIO MARRERO, and WILLIAM SORIA,

Third-Party Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Jaime Pieras, Jr., Senior U.S. District Judge]

Before
Boudin, Chief Judge,
Torruella and Selya, Circuit Judges.

May 1, 2006

BOUDIN, Chief Judge. This appeal concerns a settlement reached in 2002 between F.A.C., Inc. ("FAC") and Cooperativa de Seguros de Vida de Puerto Rico ("COSVI"). FAC is a consulting firm that was hired by the Puerto Rico Department of Health ("the Department") to review certain past Medicare cost reimbursement claims submitted by the Department to the federal government. COSVI is a so-called "fiscal intermediary" acting for the federal government's Medicare program in evaluating claims submitted by claimants.

It appears that FAC contracted with the Department to look for unreimbursed (or under-reimbursed) Medicare claims from past years and to obtain reopening of such claims, receiving in exchange the promise of a portion of any new recovery. In July 1995 FAC did submit a package of claims to COSVI, seeking enlarged reimbursement for the Department. COSVI rejected the reimbursement claims, ultimately leading the Department to terminate its contract with FAC.

In 1998 FAC sued COSVI in the federal district court in Puerto Rico. In this suit, FAC charged COSVI with violations of RICO, 18 U.S.C. § 1962(a), (d) (2000), based on alleged extortion attempts relating to the reimbursement requests FAC had made on behalf of the Department. On April 17, 2002, on the third day of a jury trial, FAC and COSVI reached a settlement agreement. They subsequently informed the district court that they had settled, and, at the parties' request, the court on April 23, 2002, dismissed the case with prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

Unfortunately, the settlement agreement was oral, which is permissible, see Quint v. A.E. Staley Mfg. Co., 246 F.3d 11, 15 (1st Cir. 2001), cert. denied, 535 U.S. 1023 (2002), although often unwise. Thereafter, the district court was on two different occasions asked to clarify and enforce the settlement. Importantly, both parties sought (and benefitted from) the district court's intervention after the settlement was reached.

As early as May 2002, FAC began a succession of court filings and protest letters to COSVI, claiming that COSVI was not living up to the settlement. Most pertinent to the present appeal, FAC complained that COSVI had not sent a promised letter to the Centers for Medicare and Medicaid ("CMS"), the federal agency that had power to approve the reopening of certain of the past reimbursement claims identified by FAC.[1]

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[1] The Centers are an entity within the federal Department of Health and Human Services. They are the successor entity to the Health Care Financing Administration ("HCFA"), which was the relevant entity at the time the complaint was filed. We use the term "CMS" throughout, and substitute it where quoted material from the record referred to HCFA.

Both sides agreed that a letter was promised, but they differed as to its terms. FAC construed COSVI's obligation as one of admitting to CMS that fraud had occurred within the COSVI organization. COSVI, writing to CMS in May 2002 to request reopening of the claims, was apparently anxious to minimize the scope of any admissions and went no further than to explain that "[t]his request is based on facts learned by COSVI as a result of its litigation with FAC, Inc., and pursuant to 42 CFR Section 405.1885(d)." The cited regulation permits an "intermediary determination" to be "reopened and revised at any time if it is established that such determination . . . was procured by fraud or similar fault of any party to the determination." 42 C.F.R. § 405.1885 (d) (2005).

CMS refused to reopen, saying only that the exceptions to the otherwise applicable three-year time limit on reopening requests--which include subsection (d)--"do not fit the facts of this case." COSVI wrote a second letter in July 2002 that went no further in admissions but offered to seek a court order to provide certain "documentary evidence" for CMS to consider, possibly an oblique reference to FBI reports. CMS still took no action to reopen the claims.

In the meantime, COSVI, in response to filings by FAC in the district court seeking enforcement of the settlement agreement, not only defended its own actions but in turn sought district court action to compel FAC to dismiss claims it had earlier brought against COSVI in the local Puerto Rico trial court. These local claims encompassed the same underlying conduct as FAC's federal court RICO claims, but sought relief on behalf of individual plaintiffs under Puerto Rico defamation law. COSVI argued to the district court, and FAC denied, that dismissal of such claims was part of the federal court settlement.

In August 2002, the district court resolved the matter by amending its original April 2002 judgment of dismissal with prejudice. The amended August 2002 judgment began by summarizing the court's understanding of the settlement as follows:

> This Court actively participated in the settlement discussions held by the parties before and during the trial of the case. The Court understood the agreements reached to be summarized as follows:
>
> a. The payment to Plaintiff's officials by Defendant COSVI of an amount that the parties agreed not to disclose publicly.
>
> b. The payment is to be in consideration of Plaintiff's claims under 31 P.R. Laws Ann. §§ 1802 and 1803, as all allegations under RICO have been dismissed.
>
> c. The sending of a letter by COSVI to [CMS], on behalf of FAC, Inc., requesting the reopening of the Medicare Part A reimbursement claims.
>
> d. That any payments made as a result of the audit of the Medicare claims would be deposited in this Court for distribution purposes.
>
> e. The dismissal with prejudice of the instant case and of [FAC's local court action].

The amended judgment then discussed the dispute between the parties as to whether the settlement agreement required FAC to dismiss its local court action, and determined that it did. The judgment concluded by saying: "As per the terms of the settlement agreement and Fed. R. Civ. P. 41(a)(2), the Amended Complaint is hereby DISMISSED with prejudice . . . . " Neither side appealed from this amended judgment; FAC dismissed the state claims and the district court subsequently disbursed certain

funds that had been deposited with the court by COSVI to implement the settlement.

During 2003, CMS was apparently given access to further information relating to an FBI investigation, but it still did not authorize the reopening of the disputed claims. In late 2003, FAC filed a motion asking the district court to order COSVI to comply with various obligations which FAC claimed to be part of the settlement, including reopening the claims in question on its own authority. COSVI denied that it could reopen the claims on its own authority and said it had complied with all its obligations, including the required request to CMS to reopen the claims.

In September and October 2004, the district court denied FAC's new motion and then, on FAC's reconsideration motion, reopened the matter. In August 2005, the district court entered a new order discussing at length the procedural history of the case and concluding that COSVI's earlier letter to CMS had not complied with its settlement obligations. The court ordered COSVI to send CMS a new request for reopening, which was to include the following sentence: "It has come to our attention that fraudulent activities took place within our organization with regard to the claims at issue, and, pursuant to 42 CFR Section 405.1885(a) and (d), we request that you reopen and reassess the claims in question due to a finding of fraud or similar fault."

COSVI then filed the present appeal to this court and obtained a stay pendente lite of the direction that it send the new letter. On this appeal, COSVI argues that the district court had not retained jurisdiction to construe and enforce the settlement. In the alternative, it says that the district judge improperly modified the terms of the settlement and erred in concluding that COSVI had failed to comply with it. We

begin, of course, with the jurisdictional objection. See Bolduc v. United States, 402 F.3d 50, 55 (1st Cir. 2005).

In the district court, COSVI did not object to the court's authority to construe and enforce the settlement, but the objection to subject matter jurisdiction is not waivable and may be raised for the first time on appeal. Am. Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP, 362 F.3d 136, 138-39 (1st Cir. 2004). If the district court's authority rested solely on the original judgment, we would agree that the settlement could not be enforced, save by an independent law suit; but, as we will see, the entry of the amended judgment alters the situation adversely to COSVI.

The law is now settled that a federal court does not have inherent jurisdiction to enforce a settlement merely because it presided over the law suit that led to the settlement. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379-80 (1994). The federal court has "ancillary" jurisdiction to enforce only if

> the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal--either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.

Id. at 381. Otherwise, "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction," id. at 382, such as diversity of parties.

Here, the original judgment recited that "[a]ll parties have come to a settlement agreement" and then said that "[p]ursuant to that agreement and Federal Rule of Civil Procedure 41(a)(2)," the case was dismissed with prejudice. In our view, this bare reference to "a settlement agreement" does not satisfy Kokkonen, and, although the question is closer, even the "pursuant to" language is

not enough to "incorporate the terms" of the unwritten settlement into the judgment.

The circuits appear to be in accord on the first point.[2] On the second, there are two holdings in accord with our own, see RE/MAX, 271 F.3d at 642; Phar-Mor, 172 F.3d at 274, with one judge in another circuit believing that language such as "pursuant to" or "in accordance with" is enough. Lucille v. City of Chicago, 31 F.3d 546, 549 (7th Cir. 1994) (Cudahy, J., concurring), cert. denied, 513 U.S. 1154 (1995). Hard and fast rules may be unwise because of variations in language and context; but in the present case we think that Kokkonen's requirements for retained jurisdiction were not satisfied by the first judgment.

However, in August 2002, four months after the original judgment, the district court entered an amended judgment without any objection from the parties as to its authority to do so. In the amended judgment, the court set forth its understanding of the main terms of the settlement, proceeded to "adjudicate" the dispute as to whether FAC had to dismiss its claims in the local-court action, "ordered" that claims be dismissed, and gave some further directions before reentering the dismissal with prejudice.

This new "amended final judgment" does go far enough to satisfy Kokkonen: it incorporates the terms of the settlement and, even more plainly, expresses by its very action in adjudicating a dispute about those terms an intention to retain jurisdiction to resolve disputes about the settlement. Neither

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[2] See RE/MAX Int'l, Inc. v. Realty One, Inc., 271 F.3d 633, 642 (6th Cir. 2001), cert. denied, 535 U.S. 987 (2002); In re Phar-Mor, Inc. Sec. Litig., 172 F.3d 270, 274 (3d Cir. 1999); Scelsa v. City Univ. of New York, 76 F.3d 37, 41 (2d Cir. 1996); Miener v. Mo. Dep't of Mental Health, 62 F.3d 1126, 1128 (8th Cir. 1995).

party appealed from this new judgment. It therefore constitutes a final judgment asserting ongoing authority over the case and itself provides the baseline for evaluating any further action by the district court.

COSVI counters by asserting that the district court had no authority to enter the amended judgment. Because the amended judgment granted relief sought by COSVI (namely, the direction to FAC to dismiss the pending local suit), one might ask whether COSVI should be permitted to question the court's authority. But in any event the court did not lack subject matter jurisdiction to determine whether to amend its judgment, and the merits of its decision to amend are no longer open to review.

Rule 60 of the Federal Rules of Civil Procedure sets out a series of grounds on which a district court may amend a final judgment. These include "errors" in the judgment "arising from oversight or omission," Fed. R. Civ. P. 60(a); "mistake, inadvertence, surprise, or excusable neglect" (only available within the first year after judgment has issued), Fed. R. Civ. P. 60(b)(1); and "any other reason justifying relief from the operation of the judgment," Fed. R. Civ. P. 60(b)(6).

Quite possibly it was a mistake to amend the judgment in August 2002, but this is not because of Kokkonen; that decision restricts enforcement of existing judgments and says nothing about whether and when a judgment may lawfully be amended. See 511 U.S. at 378. A plausible objection would start with the notion that, although permissible grounds for amendment are broadly stated in Rule 60, they have been construed somewhat stringently because they compromise the finality of judgments. See, e.g., Morgan Gty. Tr. Co. of N.Y. v. Third Nat'l Bank of Hampden County, 545 F.2d 758, 760 (1st Cir. 1976); cf. Roger Edwards, LLC v. Fiddes & Son, Ltd., 427 F.3d 129, 134 (1st Cir. 2005).

The judge's authority to amend the judgment is perhaps clearest where the judgment as entered merely failed to express the court's intention. See Fed. R. Civ. P. 60 (a); Boston Car Co. v. Acura Auto. Div., Am. Honda Motor Co., 971 F.2d 811, 814-15 (1st Cir. 1992). Here, within a few months of the original April 2002 judgment, both the judge and parties acted as if the court had originally intended to reserve authority to superintend enforcement. The inference that this was the judge's original intention is not especially strong, but it is at least colorable.

That is all that matters. The district judge had subject matter jurisdiction to determine whether to find that the circumstances permitted and warranted amendment. This is the message of Bell v. Hood, 327 U.S. 678, 682-83 (1946), which remains settled law, see, e.g., Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1244 & n.10 (2006). If his decision to amend was mistaken, it was up to the party objecting to amendment to file a timely appeal from the amended judgment, which COSVI failed to do.

There is no doubt that the amended judgment was appealable at the time it was entered. It substituted a new judgment which expressed the court's understanding of certain terms of the settlement, established implicitly the court's continuing enforcement authority and directed compliance by FAC with an unmet obligation. No further proceedings having been ordered, it was unquestionably a final judgment that either side could have chosen to appeal. See United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 14 (1st Cir. 1986).

The amended judgment also disposes of COSVI's argument that the original judgment of dismissal under Rule 41(a) did not allow the court to retain jurisdiction because such a retention requires the consent of both parties. The case is now governed by the amended judgment, not the original dismissal. As it happens, COSVI's premise even as to the original

dismissal is mistaken; that dismissal was under Rule 41(a)(2), which permits the court to condition dismissals.[3]

We turn now to the merits of the present appeal. The question is whether the district court permissibly construed the settlement agreement to require COSVI to write a letter to CMS containing the language mandated by the order under review, namely, an admission that "fraudulent activities took place within our [i.e., COSVI's] organization with regards to the claims at issue." To sum up at the outset, the district court handled a very odd situation in a practical and (we conclude) defensible manner.

That a major case should be settled on complex terms without anything in writing is itself peculiar. A further curiosity is that neither side offered or proffered any testimony as to what the lawyers or principals actually said in the settlement negotiations. All we know is that the judge was involved in the settlement negotiations and asserts that his new order implements the parties' intentions.

The law is a shade unsettled as to the standard of review we should apply--specifically, as to what weight, if any, is to be given to the district judge's construction of a settlement agreement or consent decree. Our own precedent, perhaps surprisingly, suggests that in this circuit review of the interpretation of settlement agreements (as well as consent

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[3] Compare Kokkonen, 511 U.S. at 381 (decision to retain jurisdiction to enforce settlement agreement after Rule 41(a)(2) dismissal is "in the court's discretion"), with Munic. of San Juan v. Rullan, 318 F.3d 26, 30 (1st Cir. 2003) (district court may exercise continuing jurisdiction after Rule 41(a)(1)(ii) dismissal only if the parties consent); Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc., 183 F.3d 10, 14 (1st Cir. 1999) (same).

decrees) is ordinarily de novo.[4] But our precedents also recognize that this cannot be a hard and fast rule. See Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1337-38 (1st Cir. 1991) (exception for "public interest" consent decrees).

The present situation--no evidentiary hearing but personal knowledge by the judge based on his judicial participation in negotiations--argues for some deference. Indeed, some of our cases say that an exception may exist where the district judge has "special knowledge concerning the parties' intentions." Navarro-Ayala, 951 F.2d at 1339 n.17; cf. Malave v. Carney Hosp., 170 F.3d 217, 221 (1st Cir. 1999). We think this is only common sense.

Showing even the mildest deference, it is easy to sustain the district court's construction of the settlement. Apart from relying on its own knowledge, the district court pointed out that COSVI's May 2002 letter to CMS reflected an understanding that the reopening it was committed to support was to be based on a regulation that permitted reopenings after the ordinary three-year deadline "if it is established that such determination or decision [on a claim] was procured by fraud or similar fault," 42 C.F.R. § 405.1885(d). The court continued:

> The Court FINDS that a letter that is silent on the reasons for the request for reopening the reimbursement claims would clearly fail to satisfy the terms of the settlement. Without direct acknowledgment to CMS of the fact that fraud or similar

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[4] Whitehouse v. LaRoche, 277 F.3d 568, 573 (1st Cir. 2002); The Korman Co. v. Cumberland Farms, Inc., 140 F.3d 331, 333 (1st Cir. 1998). Compare, e.g., Washington Hosp. v. White, 889 F.2d 1294, 1299 (3d Cir. 1989) (de novo review), with Therma-Scan, Inc. v. Thermoscan, Inc., 217 F.3d 414, 419 (6th Cir. 2000) (abuse-of-discretion standard).

> fault occurred in relation to the reimbursement claims in question, CMS would have no compelling reason to reopen the claims.

The logic is not invincible, but it is pretty strong. In theory, COSVI might have bargained for the extremely guarded admission it actually made in its May 2002 letter, which said that the request to reopen was based on "facts learned by COSVI as a result of its litigation with FAC" and was made pursuant to the regulation. In the real world, it is not easy to imagine FAC settling for anything so ambiguous. Or at least that seems unlikely in the context of the litigation to which the letter refers.

FAC says in its brief (and the trial transcript reflects) that at the outset of the trial COSVI' s own counsel said to the jury about COSVI's vice president: "Andres Rodriguez . . . is the gentleman who may have been involved in bribes, may have been involved in illegal activities and I think the evidence will show it." In other words, the settlement terminated litigation in which it appears quite likely that FAC was about to establish the facts pretty close to what COSVI now refuses to put in writing to CMS.

There is one other piece of strong evidence in favor of FAC's construction. The settlement was reached on April 17, 2002. Five days later, on April 22, FAC's counsel sent a letter to COSVI's counsel. The letter set forth, among the points that COSVI's letter to CMS "should include," the following: "COSVI's acknowledgment that such claims must be reopened by [CMS] pursuant to regulation (42 CFR Section 405.1885(d)) as a result of the 'fraud or similar fault' of Andres Rodriguez, a party to the prior determination."

FAC told the district judge that its April 22 letter "was sent immediately upon returning . . . from trial in Puerto Rico, was based upon notes taken at trial and during settlement negotia-

tions and was the correspondence most contemporaneous to the trial which was exchanged between the parties after trial." There is no indication that COSVI wrote back, in the usual fashion of fencing lawyers, to dispute FAC's version of events.

Instead, COSVI wrote a letter in May 2002 to CMS, bearing out its understanding that a letter had to be written along the lines demanded by FAC but varying the punch line to avoid any direct repetition of what its own counsel appeared to have admitted in open court. COSVI can surely argue that its letter expressed its own understanding of its obligation under the settlement. But the absence of an immediate corrective response to FAC's April 22 letter is still telling.

FAC's case for its reading is hardly air tight. A "term sheet" that both parties agree was circulated during settlement negotiations says nothing about any letter, but that itself is not surprising. FAC's initial position appears to have been that COSVI itself could reopen the claims, and the term sheet took no position on this issue but dealt with how the reopened claims were to be processed and with other elements of the settlement. Conceivably, the letter to CMS was introduced late in the day to deal with COSVI's asserted inability to reopen the claims on its own.

What is harder for FAC to explain is why it did not immediately protest as inadequate the obscure wording ("facts learned by COSVI") used when COSVI sent its May 2002 letter to CMS. Yet at that time no one likely knew exactly how CMS would respond to the letter which, after all, made the basic request to reopen, cited the pertinent regulation and could be read to imply the predicate admission of fraud or like fault. Possibly FAC hoped that, without starting a separate quarrel, it would all work out.

On this appeal, as in the district court, COSVI focuses on the language in the district court's August 2002 amended judgment, which says that the settlement agreement included "[t]he sending of a letter by COSVI to [CMS], on behalf of FAC, Inc., requesting the reopening of the Medicare Part A reimbursement claims." According to COSVI, the failure of the amended judgment to require COSVI to admit to any fraud in its letter to CMS is dispositive of the issue. This is quite unpersuasive.

The amended judgment merely purported to "summarize[]" the agreement and it did not describe in detail the contents of the required letter. The judge's subsequent interpretation of the agreement as requiring COSVI to admit fraud in its letter to CMS is not inconsistent with this earlier summary. Indeed, the focus of the August 2002 decision was not on the letter but on the dispute as to whether the local court claims had to be dismissed.

In the end, the district judge's assessment of COSVI's obligation is reasonable and more likely right than wrong. Because the parties did not put their precise understanding in writing, anything done to reduce to precise language what was probably only a concept has to be an approximation. Parties who settle cases in the fashion done here create the problem for themselves. The district judge is to be admired for grasping the nettle.

About the only real concern one might have is the absence of an evidentiary hearing. This case appears tailor-made for direct testimony as to what the parties said to one another at the time of the settlement. Like other courts, we have regularly endorsed this course "if there is a genuinely disputed question of material fact regarding the existence or terms of [a settlement] agreement." Malave, 170 F.3d at 220; see also Kinan v.

Cohen, 268 F.3d 27, 32-33 (1st Cir. 2001); accord, e.g., Wilson v. Wilson, 46 F.3d 660, 664 (7th Cir. 1995).

Yet this assumes that the parties, or at least one of them, requested such a hearing and had testimony worth presenting. Although COSVI claimed at oral argument before us that it did request an evidentiary hearing in the district court, it is decisive that COSVI made no such claim in its briefs here and has not argued that the failure to hold an evidentiary hearing was error. See Lopes v. Met. Life Ins. Co., 332 F.3d 1, 6 n.8 (1st Cir. 2003) (claims made in this court for the first time at oral argument are waived).

Under these circumstances, we can hardly fault the district court for relying upon its own familiarity with the background events and with inferences that are adequately based on the record. Parties are perfectly free to submit issues for resolution on whatever limited evidence they choose to present. The courts decide disputes on the records before them and do not warrant their findings sub species aeternitatis.

Whether CMS will or should do anything as a result of the new sentence in the new letter required of COSVI is plainly beyond the scope of this opinion. The parties have left in obscurity the relationship of the original Department claims to FAC's later ones and the relationship to either of any fraud that occurred or was attempted. All we decide is that FAC is entitled to the benefit of its bargain with COSVI--for whatever that may be worth.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2332

F.A.C., INC.,
d/b/a FINANCIAL ADVISORS AND CONSULTANTS, INC. (FAC),

Plaintiff, Appellee,

v.

COOPERATIVA DE SEGUROS DE VIDA DE PUERTO RICO, (COSVI),

Defendant-Third-Party Plaintiff, Appellant,

GABRIEL DOLAGARY, MARÍA CRISTINA ORTIZ, JOSÉ A. BRULL, ANDRÉS RODRÍGUEZ, ARCILIO RIVAS, and DANIEL SANTIAGO,

Defendants-Third-Party-Plaintiffs,

INSURANCE COMPANY X,

Defendant,

v.

JOSÉ RAMÓN GONZÁLEZ, ANTONIO MARRERO, and WILLIAM SORIA,

Third-Party Defendants.

JUDGMENT
Entered: May 1, 2006

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here offered, adjudged and decreed as follows: The decision of the district court is affirmed.

By the Court:

/s/
Richard C. Donovan, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2332

F.A.C., INC., d/b/a FINANCIAL ADVISORS AND CONSULTANTS, INC.

Plaintiff-Appellee

v.

COOPERATIVA DE SEGUROS DE VIDA DE PUERTO RICO

Defendant - Third-Party Plaintiff - Appellant,

GABRIEL DOLAGARY; MARIA CRISTINA ORTIZ; JOSE A. BRULL; ANDRES RODRIGUEZ; ARCILIO RIVAS; DANIEL SANTIAGO

Defendants - Third-Party-Plaintiffs

INSURANCE COMPANY X,

Defendant

v.

[J]OSE RAMON GONZALEZ; ANTONIO MARRERO; WILLIAM SORIA

Third-Party Defendants

Before

Boudin, Chief Judge,

Torruella and Selya, Circuit Judges,

Lynch, Lipez and Howard Circuit Judges,

ORDER OF COURT

Entered: May 22, 2006

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
RICHARD CUSHING
DONOVAN, Clerk

/s/

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FAC, INC. d/b/a FINANCIAL ADVISORS AND CONSULTANTS, INC.,	*	
Plaintiff	*	
vs.	*	CIVIL NO. 98-1592 (JP)
COOPERATIVA DE SEGUROS DE VIDA, Et al.,	*	
Defendants	*	

FINAL JUDGMENT

All parties have come to a settlement agreement. Pursuant to that agreement and Federal Rule of Civil Procedure 41(a)(2), the Court hereby **DISMISSES** the above-captioned Complaint, as to all Defendants, all counterclaims and all third-party claims corresponding with the current litigation, **WITH PREJUDICE**, and without the imposition of costs or attorneys' fees.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 19th day of April, 2002.

/s/
JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FAC, INC. d/b/a FINANCIAL ADVISORS AND CONSULTANTS, INC.,	*	
Plaintiff	*	
vs.	*	CIVIL NO. 98-1592 (JP)
COOPERATIVA DE SEGUROS DE VIDA, Et al.,	*	
Defendants	*	

AMENDED FINAL JUDGMENT

Pending are several motions filed by the parties after settlement was reached and a Final Judgment was entered by this Court on April 19, 2002 (docket Nos. 255, 259, 261, 263, 265, 270, 272).

This Court actively participated in the settlement discussions held by the parties before and during the trial of the case. The Court understood the agreements reached to be summarized as follows:

a. The payment to Plaintiff's officials by Defendant COSVI of an amount that the parties agreed not to disclose publicly.

b. The payment is to be in consideration of Plaintiff's claims under 31 P.R. Laws Ann. §§ 1802 and 1803, as all allegations under RICO have been dismissed.

c. The sending of a letter by COSVI to HCFA, on behalf of FAC, Inc., requesting the reopening of the Medicare Part A reimbursement claims.

d. That any payments made as a result of the audit of the Medicare claims would be deposited in this Court for distribution purposes.

e. The dismissal with prejudice of the instant case and of the case of José R. González y Otros v. Gabriel Dolagaray y Otros, Civil No. KDP 1998-1618(801).

Until recently, the Court was not informed that the dismissal of the local court case was no longer part of the agreement. To the contrary, this Court believed that the dismissal of the local court case was always included in the settlement discussions as one of Defendants' conditions.

In view of this Court's participation in the settlement discussions and its knowledge of the agreements reached, no evidentiary hearing is necessary in order to adjudicate the present controversy. The undersigned Judge, when practicing law and during his career as a Judge, was never interested in settlements that were not total settlements and certainly was of the understanding that this settlement was a total settlement of all matters pending, including the state court case. This Court intended only the complete and total resolution of the issues surrounding this case. For this reason, it is hereby **ORDERED** that the local case be dismissed as part of this settlement and that Plaintiff's officials shall act accordingly and move to voluntarily dismiss the local court case, José R. González y Otros v. Gabriel Dolagaray y Otros, Civil No. KDP 1998-1618(801), on or before **September 20, 2002**. Failure to

comply with the terms of this order **SHALL** result in sanctions. Plaintiff **MAY** move for the withdrawal of the moneys deposited by the Defendants in the registry of this Court by filing a motion that **SHALL** include as an attachment a **CERTIFIED** copy of the Judgment of dismissal entered by the Superior Court of San Juan.

Plaintiff's Motion to Amend the Complaint (docket No. 255) is hereby **GRANTED.** As per the terms of the settlement agreement and Fed. R. Civ. P. 41 (a)(2), the Amended Complaint is hereby **DISMISSED** with prejudice and payment to the individual Plaintiffs is to be effectuated, once they comply with the terms of this Order, as compensatory damages under 31 P.R. Laws Ann. §§ 1802 and 1803. All other pending motions are hereby **DENIED AS MOOT.**

IT IS SO ORDERED AND ADJUDGED.

In San Juan, Puerto Rico, this 29th day of August, 2002.

/s/

JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FAC, INC. d/b/a FINANCIAL ADVISORS AND CONSULTANTS, INC.,	*	
Plaintiff	*	
vs.	*	CIVIL NO. 98-1592 (JP)
COOPERATIVA DE SEGUROS DE VIDA, et al.,	*	
Defendants	*	

ORDER

All pending motions are hereby **DENIED**, as this case was settled, and judgment was entered accordingly on **August 8, 2002** (Docket **274**), thus disposing of all pending mutual claims. The same is res judicata, final and unappealable.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 28th day of September, 2004.

s/ Jaime Pieras, Jr.
JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

REPLY BRIEF

FILED
NOV 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)
No. 06-458

IN THE
Supreme Court of the United States

COOPERATIVA DE SEGUROS DE VIDA,
DE PUERTO RICO (COSVI)
Petitioner,

v.

F.A.C., INC., d/b/a FINANCIAL ADVISORS
AND CONSULTANTS, INC. (FAC), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

ALAN I. HOROWITZ
Counsel of Record
MILLER & CHEVALIER
CHARTERED
655 15th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for Petitioner

TABLE OF CONTENTS

Page

CONCLUSION.....7

TABLE OF AUTHORITIES

Page

CASES

American Fire & Casualty Co. v. Finn,
341 U.S. 6 (1951) 4

Kokkonen v. Guardian Life Insurance Co.,
511 U.S. 375 (1994) ..... *passim*

McAlpin v. Lexington 76 Auto Truck Stop, Inc.,
229 F.3d 491 (6th Cir. 2000) 5

Sosna v. Iowa,
419 U.S. 393 (1975) 4

FEDERAL RULES

Fed. R. Civ. P. 60 ..... *passim*

REPLY BRIEF FOR THE PETITIONER

In the petition, we explained that certiorari should be granted here because of a conflict in the circuits and because the court of appeals' decision undermines this Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). Specifically, the court of appeals' decision authorizes a district court to enforce a settlement long after it relinquished jurisdiction over a controversy by dismissing the action, notwithstanding the rule of *Kokkonen* that a court can exercise such enforcement jurisdiction only if it retains jurisdiction at the time it dismisses the underlying action. The court of appeals justified this result by characterizing the district court's action as a correction of a "clerical mistake" pursuant to Fed. R. Civ. P. 60 – notwithstanding that the record contains no evidence of a "mistake" and that neither the district court nor either party invoked Rule 60. The court's holding conflicts with the decisions of several courts of appeals that have rejected similar attempts to invoke Rule 60 as a way of evading *Kokkonen*.

In its brief in opposition, respondent does not take issue with most of the legal discussion in the petition. Instead, respondent focuses on the facts and misstates the record in an attempt to obscure the legal significance of the court of appeals' opinion. This reply brief accordingly will address some of respondent's factual characterizations as well as the legal issue that warrants this Court's review.

1. As the court of appeals stated, "the settlement agreement was oral." Pet. App. 3a. Respondent, however, incorrectly suggests that there was a *written* settlement agreement. Respondent attaches two documents to its brief in opposition and cites them as authority for the contents of "the ensuing settlement agreement and Final Judgment between the parties to this appeal entered on April 23, 2002."

Br. in Opp. 1 (*citing* Br. in Opp. App. 3a-7a). In fact, neither of the documents in respondent's appendix reflects the substance of the settlement agreement. The first document (*id.* at 3a-4a) is a "term sheet" that was circulated by respondent FAC during the settlement discussions. *See* Pet. App. 14a. That document reflects proposals made by FAC, but they were not necessarily agreed to by COSVI. (Indeed, if the "term sheet" did represent the actual settlement, there would be no basis whatsoever for the court of appeals' decision because the "term sheet" contains no requirement that COSVI send a letter to CMS.) The second document (Br. in Opp. App. 5a-7a) is a settlement agreement between respondent FAC and *Andres Rodriguez*, a separate defendant in the action. COSVI was not a party to that agreement, and it is entirely irrelevant to this case.

Respondent also reprints the same excerpt from the opening statement at trial that was quoted by the court of appeals, in an effort to suggest that COSVI was guilty of fraud. *See* Br. in Opp. 1 (*citing* Br. in Opp. App. 2a); Pet. App. 13a. Respondent, however, ignores petitioner's discussion of the excerpt and does not dispute petitioner's assertion that the opening statement made clear COSVI's position that COSVI did not commit fraud in this matter and that Rodriguez had no role in dealing with FAC's reimbursement claims. *See* Pet. 8.

Respondent also asserts without citation that, had the trial continued, there would have been testimony about FBI tapes that would have proved fraud on COSVI's part. Br. in Opp. 1. The record lends no support to this assertion; the tapes did not contain evidence of fraud on COSVI's part. To the contrary, the record shows that the FBI report was eventually unsealed and made available to CMS, but CMS did not act upon that evidence to reopen the contested claims on the basis of fraud. *See* Pet. 4.

2. Respondent's primary defense of the decision below is to assert without citation that the decision complies with *Kokkonen* because the underlying action "had been dismissed with the *express* understanding that the implementation of the settlement would require its continuing jurisdiction." Br. in Opp. 6-7 (emphasis added). But there is no expression of any such understanding. The court's judgment stated only that it was dismissing the complaint, with no hint that the court was retaining jurisdiction to enforce the settlement. Pet. App. 21a. Under *Kokkonen*, that judgment unquestionably is inadequate to retain jurisdiction. A district court has jurisdiction to enforce a settlement agreement following dismissal only if "the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal – either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Kokkonen*, 511 U.S. at 381. Contrary to respondent's assertion that "the District Court's continuing jurisdiction over the case was the only viable manner in which the settlement could be implemented" (Br. in Opp. 5), this Court has made clear that, in such circumstances, "enforcement of the settlement agreement is for state courts." *Id.* at 382.

Respondent similarly asserts that "the record does show that the parties and the court intended for the District Court to retain jurisdiction of the settlement after the case was dismissed." Br. in Opp. 5; *see also id.* at 7 ("[i]t is clear from the record that the District Court and the parties intended for the District Court to retain jurisdiction of the settlement after the case was dismissed.") In fact, the record does not show any such intent. The only contemporaneous material cited by respondent is language from a letter written by respondent's counsel. *See* Br. in Opp. 1-2, 5 (*apparently quoting* Br. in Opp. App. 9a-10a). Like the "term sheet,"

respondent's counsel's letter reflects a proposal by FAC, not an agreement of the parties.

In any event, even assuming that the parties had agreed upon the proposal made by FAC – namely, that funds received pursuant to a new audit of the claims should be paid to the court, "which shall retain jurisdiction *for the purpose of distributing the funds stemming from such audit*"– that would not support respondent's assertion. *See* Br. in Opp. 1-2 (emphasis added); *see also* Br. in Opp. App. at 11a. It is one thing for the parties to ask the court to act for a limited purpose – as a neutral depository and distributor of funds that might be paid at some future time. It is quite another for the court to exercise broad jurisdiction to resolve controversies between the parties and to enforce an existing settlement. Moreover, the parties' intent cannot confer jurisdiction on a federal court. *See, e.g.*, *Kokkonen*, 511 U.S. at 377; *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 & n.17 (1951). The district court here could have had jurisdiction to enter the August 2002 "amended judgment" or the later August 2005 judgment only if it had retained jurisdiction in April 2002 in accordance with the requirements of *Kokkonen* or if there were some independent jurisdictional basis provided by statute for enforcing the settlement. Respondent does not dispute that neither of these conditions was satisfied, and therefore the district court lacked jurisdiction to enter those later judgments once it relinquished jurisdiction by dismissing the underlying action.[1]

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[1] Similarly, respondent errs in asserting that COSVI's failure to appeal the August 2002 amended judgment somehow has the effect of retroactively giving the district court jurisdiction to enter that judgment. *See* Br. in Opp. 9. Indeed, because that judgment "gave COSVI the relief it requested" (*id.* at 2-3), COSVI could not have appealed it, and, in any event, the August 2005 order was not based upon the August 2002 judgment. *See* Pet. 13-14 & n.1. By

3. Respondent argues (Br. in Opp. 7-8) that the decision below does not conflict with decisions of the Sixth, Seventh, and Eighth Circuits because those decisions involved attempts to invoke Fed. R. Civ. P. 60(b) to evade *Kokkonen*, whereas the court of appeals here invoked Rule 60(a). This is a distinction without a difference. Both subsections of Rule 60 address "relief from judgment"; subsection (a) is limited to "clerical mistakes" and subsection (b) covers a broader set of grounds, including "mistakes" and "inadvertence." The conflicting court of appeals cases rejected efforts to use Rule 60 to create jurisdiction to enforce a settlement when the district court had not retained such jurisdiction at the time of dismissal. Those courts held that this would have been a misuse of Rule 60, because there was no question of "relief from judgment." The claimants did not wish to disturb the judgment of dismissal; they sought instead to create district court jurisdiction over a different matter, the settlement. That would have been an impermissible evasion of *Kokkonen*. *See* Pet. 15-18. Those objections are the same whether the claimant relies on subsection (a) or subsection (b) of Rule 60. In either case, allowing Rule 60 to be used in this manner "would create an exception to the holding in *Kokkonen* that would swallow the rule." *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 503 (6th Cir. 2000).

We note, moreover, that the court of appeals' invocation in this case of Rule 60(a), rather than Rule 60(b), is highly dubious. *See* Pet. 11-13. Certainly there was no "clerical" mistake in the district court's original judgment of dismissal. Nor was there was anything in the record indicating that the

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the same token, respondent is mistaken in accusing COSVI of "refus[ing] to comply with the terms of the Amended Final Judgment" (Br. in Opp. 3); COSVI performed all actions required by that judgment. *See* Pet. App. 22a-24a.

court originally meant to incorporate the settlement in its dismissal order – even though the prevailing view is that the presence of objective record evidence is necessary to prevent Rule 60(a) from becoming a virtually unrestricted grant of authority to district courts to change final judgments. *See* Pet. 12. (Indeed, in this case even the district court did not claim that there was a "clerical mistake" in its original judgment or otherwise invoke Rule 60; that justification was supplied after the fact by the court of appeals.) If the distinction proffered by respondent were valid, and if district courts can invoke Rule 60(a) simply by asserting months later that they forgot to retain jurisdiction, that would allow district courts to evade not only *Kokkonen* but also the uniform circuit precedent that prohibits use of Rule 60(b) as a vehicle for creating jurisdiction to enforce a settlement.

The court of appeals' decision here authorizes this result by using Rule 60 to validate district court orders that set forth alleged settlement terms for the first time and then enforced those terms – long after the court had relinquished jurisdiction over the dispute. That decision eviscerates *Kokkonen* and creates a conflict in the circuits. Accordingly, it warrants review by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN I. HOROWITZ
Counsel of Record
MILLER & CHEVALIER
CHARTERED
655 15th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for Petitioner

NOVEMBER 2006